Nos. 16-1436 and 16-1540

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Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* KHIZR KHAN IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

On October 3, 1965, at the foot of the Statue of Liberty, President Lyndon B. Johnson commemorated the abolition of discrimination from the Immigration and Nationality Act ("INA"). Saluting those who have been "brave enough to die for liberty," President Johnson remarked:

> Neither the enemy who killed them nor the people whose independence they have fought to save ever asked them where they or their parents came from. They were all Americans. It was for free men and for America that they gave their all, they gave their lives and selves. By eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation.

Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).

On June 8, 2004, at an Army base in Iraq, Captain Humayun Khan joined the hallowed company of those who have sacrificed everything for this country. Captain Khan died stopping a car full of explosives before it could reach hundreds of other American soldiers. He was one of thousands of Muslims who have served in the United States armed forces since the terrorist attacks of September 11, 2001. It is now the sacred duty of this Court to ensure that we remain worthy of those men and women, and worthy of our traditions as a Nation—including the Constitution itself, which Captain Khan gave his life to defend.[1]

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1. No part of this brief was authored or funded by anyone other than *amicus curiae* Khizr Khan and his counsel. Mr. Khan has respondents' written consent to file this brief, and petitioners have filed a blanket consent.

II. INTEREST OF *AMICUS CURIAE* KHIZR KHAN

Amicus curiae Khizr Khan is the father of Captain Humayun Khan, and has an interest in this case because Executive Order No. 13,780 ("the Executive Order") desecrates his son's service and sacrifice as a Muslim-American officer in the United States Army, and also violates Mr. Khan's own constitutional rights.

A. Out of the melting pot and into the fire

Mr. Khan is originally from Pakistan. He met his wife, Ghazala, at the University of Punjab, where she studied Persian and he studied law. After they married, they moved to the United Arab Emirates, where their son Humayun was born on September 9, 1976. In 1980, the Khans came to the United States, originally settling in Houston, Texas. Once they had saved enough money, Mr. Khan enrolled at Harvard Law School, graduating with a master of laws (LL.M.) degree in 1986. The Khans moved to Silver Spring, Maryland, where Humayun and his two brothers grew up—all of them having become United States citizens.

Thomas Jefferson has long been one of Mr. Khan's heroes, and he liked to take the boys to the Jefferson Memorial and have them read the inscription under the dome: "I have sworn upon the altar of god eternal hostility against every form of tyranny over the mind of man." Years later, when Humayun applied to the University of Virginia, he invoked the spirit of Jefferson, writing that "liberty requires vigilance and sacrifice," and that those who are "beneficiaries of liberty must always bear this in mind, and keep it safe from attacks." Putting those ideals

into practice, Humayun enrolled in the Army Reserve Officers' Training Corps (ROTC).

Humayun graduated in 2000 and was commissioned as an Army officer, eventually attaining the rank of Captain. After he was called to serve in Iraq, he reminded his father of his college application essay about defending liberty. "I meant it," he said. He was stationed at Camp Warhorse near Baqubah, Iraq—about fifty miles northeast of Baghdad—leading the Force Protection Team of the 201st Support Battalion, First Infantry Division.

As Captain Khan's commanding officer later wrote, Captain Khan's unit was the most motivated and combat-oriented logistics unit he had ever seen. *See* Dana J.H. Pittard, *I was Capt. Khan's commander in Iraq. The Khan family is our family*, WASH. POST, Aug. 3, 2016. As a Muslim, Captain Khan was particularly able to foster warm relationships with local Iraqis. He started a program to hire locals to work on the base as a way of trying to improve relations between the soldiers and the town. And he was determined to break the cycle of violence by preventing unnecessary deaths and injuries at the gates, where several innocent Iraqi drivers had been wounded or killed because they failed to heed or did not understand the soldiers' instructions. The terrible irony is that Captain Khan's remarkable success in winning local Iraqi hearts and minds may have been what provoked the suicide bombing that took his life.

B. Captain Khan's sacrifice

On the morning of June 8, 2004, Captain Khan was supervising a checkpoint outside of Camp Warhorse. A

taxi was approaching the gates. Captain Khan could have ordered his soldiers to put a .50 caliber shell through the windshield, but perhaps this driver, like others before, was just confused. Ordering his soldiers to hit the dirt, Captain Khan moved forward to stop the taxi before it could reach the gates or the mess hall beyond, where hundreds of soldiers were eating breakfast. Captain Khan was killed when the suicide bombers in the taxi detonated their explosives.

Captain Khan was posthumously awarded a Bronze Star and a Purple Heart. The Army named the 201st Battalion headquarters at Camp Warhorse the Khan Building in his honor. The University of Virginia's ROTC center has a Khan Room dedicated to his memory. In July 2016, a regiment of ROTC cadets at Fort Knox honored Captain Khan at their graduation. Earlier this year, the University of Virginia honored Captain Khan with a memorial plaque on the University's Rotunda. But the soldier who dropped Captain Khan off at the gates that fateful morning honored him in the terms he might have appreciated most: "I read where someone called him a soldier's officer," Sergeant Crystal Selby said. "To me, he was a human's human." N.R. Kleinfield, Richard A. Oppel, Jr. & Melissa Eddy, *Moment in Convention Glare Shakes Up Khans' American Life*, N.Y. TIMES, Aug. 5, 2016.

After Captain Khan's death, Mr. and Mrs. Khan moved to Charlottesville, Virginia, to be near their two remaining sons. The Khans also have become an integral part of the University of Virginia's Army ROTC program. Since 2005, the Khans and the ROTC have given the CPT Humayun S.M. Khan Memorial Award to the fourth year cadet who best exemplifies Captain Khan's qualities

of courage, dedication, leadership, and selfless service. At the commissioning ceremonies, Mr. Khan gives the new officers pocket-sized copies of the Constitution. He reminds them to think hard about their oath to "defend the Constitution of the United States against all enemies, foreign and domestic." 10 U.S.C. § 502. No oath is more solemn, he tells them: "My son died for that document."

C. The Muslim Ban

On December 7, 2015, then-candidate Donald J. Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." When asked how this Muslim Ban would be enforced, Mr. Trump said that customs agents would ask, "Are you Muslim?" and ban people who answered "yes." Maya Rhodan, *Here's How Donald Trump Says His Muslim Ban Would Work*, TIME, Dec. 8, 2015. The Executive Order seeks to accomplish the same unconstitutional result, merely changing the question to, in effect, "Are you from one of these Muslim-majority countries?" But in 1965, Congress and President Johnson abolished such questions as unworthy of the sacrifices of soldiers like Captain Khan. *See* Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965).[2]

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2. Since 1965, Congress has repeatedly reaffirmed the nondiscrimination principles that President Johnson emphasized. For example, the Refugee Act of 1980 prohibits discrimination based on "race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). Congress intended that "the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H.R. Rep. No. 96-608, at 13 (1979).

Mr. Khan was asked to speak about his son's sacrifice at the Democratic National Convention on July 28, 2016. During that speech, Mr. Khan held up his copy of the Constitution—the pocket-sized kind he has been giving to newly-commissioned Army officers and others for years—and asked if Mr. Trump had ever read it, offering to lend him one. Mr. Khan also urged Mr. Trump to go to Arlington National Cemetery, where Captain Khan is buried, to look at the graves of brave patriots—of all faiths, genders and ethnicities—who died defending the United States. Mr. Trump responded by disparaging the Khans and their plea to respect the Constitution and those who have died defending it.

After candidate Trump became President Trump, he lost no time in implementing his unconstitutional Muslim Ban. President Trump asked his advisors to find a way to do so "legally," but they failed, and the initial executive order was enjoined. Yet the current Executive Order, as President Trump himself has publicly stated, is simply a watered-down version of the first one. Donald J. Trump, *Remarks by the President at Make America Great Again Rally*, Mar. 15, 2017. The taint of discrimination has not been washed away.

Indeed, the underlying message of the Executive Order is the same as that of the original Muslim Ban. The message is that Muslims are unwelcome outsiders. And that message has been received loud and clear—not only by Muslims like Mr. Khan, but by those who have been denigrating and attacking Muslims with increasing frequency and vehemence since President Trump called for a Muslim Ban and then issued his unconstitutional Executive Order.

III. SUMMARY OF THE ARGUMENT

A. As President Johnson stated when he signed the INA, neither the enemies who killed soldiers like Captain Khan "nor the people whose independence they have fought to save ever asked them where they or their parents came from," and by "eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation." Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1039 (Oct. 3, 1965). President Johnson was right to give credit to *Congress*, *id.*, because the principle "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Even more deeply embedded is the first principle of our Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. The Executive Order at issue here violates the separation of powers because it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

B. Moreover, not even Congress may make a law that sends a message to Muslims "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor,

J., concurring)). Yet that is precisely what the Executive Order does. Thus, the Executive Order violates the Religion Clauses of the First Amendment. *See id.*; U.S. CONST. amend. I.

For both of these reasons, *amicus curiae* Khizr Khan urges this Court to affirm the decisions below and strike down the unconstitutional Executive Order.

IV. ARGUMENT

A. The Executive Order violates the separation of powers.

As discussed further below, the Executive Order violates the Religion Clauses of the First Amendment because it sends an undeniably discriminatory message to Muslims. But this Court need not reach that issue because, even if the President issued the Executive Order with pure intentions, "to accomplish desirable objectives," the Executive Order is unconstitutional because it violates the separation of powers. *See INS v. Chadha*, 462 U.S. 919, 951 (1983). This Court "has long recognized that under the Constitution 'congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

As this Court stated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the formulation of immigration policy "is entrusted exclusively to Congress," whereas the

President's role is "the enforcement of these policies," respecting "the procedural safeguards of due process." *Id.* at 767 (quoting *Galvan*, 347 U.S. at 531). Yet the Executive Order here "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown*, 343 U.S. at 588. Like a statute, the Executive Order "sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Id.*

The Constitution, however, entrusts "the law making power to the Congress alone in both good and bad times." *Id.* at 589. Concerns about terrorism, therefore, are no excuse for blurring the separation of powers. Congress and the President must "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism," and this Court's "'insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so.'" *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

None of the authorities on which petitioners rely support their assertion of unilateral authority to promulgate new immigration policies at odds with those already established by Congress. For example, petitioners

rely on *Fiallo v. Bell*, 430 U.S. 787 (1977), but the Court in *Fiallo* afforded "judicial deference to *congressional* policy choices in the immigration context." *Id.* at 793 (emphasis added). Likewise, in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court deferred to an Act of Congress, not a unilateral executive order. *See id.* at 590. And in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), although the Court initially blurred the lines between legislative and executive power in the context of World War II, the Court went on to clarify that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," and that, even during war, any delegation of power to the executive is constrained by "congressional intent." *Id.* at 543.[3] "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

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3. Petitioners contend that the power to establish rules for excluding aliens is both legislative and executive in nature. *See, e.g.* Pet. Br. 4, 40. As Justice Thomas stated in *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015), however, the "Constitution does not vest the Federal Government with an undifferentiated 'governmental power,'" but instead identifies three types of governmental power—legislative, executive, and judicial—which may only be exercised by "the vested recipient of that power." *Id.* at 1240-41 (Thomas, J., concurring in the judgment); *see also, e.g.*, *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted," and, although the powers delegated to each branch are not "hermetically" sealed from one another, they are "functionally identifiable."). Establishing immigration policy and law are quintessentially legislative powers. *See* U.S. CONST. art. 1, § 8, cl. 4 & 18.

Nevertheless, petitioners contend that the President has essentially *unlimited* power to unilaterally enact "federal law," Pet. Br. 72—a power that, according to petitioners, is "parallel to Congress's" own legislative power, *id.* at 64, but actually *exceeds* Congress's power because it eschews bicameral passage. *Cf. Chadha*, 462 U.S. at 954-55. Petitioners argue that Congress granted the President these legislative powers in 8 U.S.C. §§ 1182(f) and 1185(a)(1). According to petitioners, those provisions do "not *constrain* the President's authority," and place "**no restrictions**" on that purported authority other than the requirement to make findings under Section 1182(f), which "does not impose any further requirements on how the President articulates such findings," and, indeed, does not specify "*any* particular factual predicates." Pet. Br. 41, 68 (italics in original, boldface added).

This Court rejected a similarly overbroad interpretation of Section 1185 in *Kent v. Dulles*, 357 U.S. 116 (1958). Section 1185(b) makes it unlawful for a citizen to depart from or enter the United States without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." *Id.* at 122 n.4. Those "broad terms"—which are the same as in Section 1185(a)(1), on which petitioners rely—did not delegate the "pervasive power" to deny passports based on "beliefs or associations." *Id.* at 127-30. Even in the context of "foreign relations," a statute cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). On the contrary, a seemingly broad grant of authority "must take its content from history," authorizing only those "refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior

administrative practice.'" *Id.* at 17-18 (quoting *Kent*, 357 U.S. at 128). Without that limiting construction, the statute would "constitute an invalid delegation." *Id.* at 18.

Similarly, President Truman's Commission on the INA warned that Section 1182(f), in the absence of a limiting construction, would be impermissibly "vague." Commission on Immigration and Naturalization, WHOM WE SHALL WELCOME 178 (1953). Although "**latitude in administrative action is frequently a desirable objective . . . such discretionary authority should not be nebulous and undefined but rather should contain some standards controlling the administrative action.**" *Id.* (emphasis in original). From Truman's time until now, executive orders under Section 1182(f) have "typically" applied to "individuals"; have sometimes been "based on affiliation"; and otherwise have suspended entry "based on objectionable conduct." 9 *Foreign Affairs Manual* § 302.14-3(B)(1) (2016), https://fam.state.gov/FAM/09FAM/09FAM030214.html.

Thus, petitioners' interpretation of Section 1182(f) as a grant of sweeping legislative authority is inconsistent with "prior administrative practice." *Kent*, 357 U.S. at 128. In any case, past practice "does not, by itself, create power." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)). "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" *Youngstown*, 343 U.S. at 588-89 (quoting U.S. CONST. art. I, § 8, cl. 18).

Congress has given the President authority to address exigent circumstances, but has not given and cannot give him the legislative power to amend Congress's "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). Nor may the President disregard Congress's command that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Nor may the President unilaterally suspend the entire refugee program, or halve the number of potential refugees—much less do so without "appropriate consultation" with Congress. 8 U.S.C. § 1157. Sections 1182(f) and 1185(a)(1) may be "broad grants of authority," but they "cannot reasonably be construed as assigning decisions of [such] vast economic and political significance." *Texas*, 809 F.3d at 183 (internal quotation marks omitted).

Petitioners' contrary interpretation would make Sections 1182(f) and 1185(a)(1) the immigration equivalents of the line-item veto, which this Court ruled unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). The Constitution denies the President the power to unilaterally suspend, amend, repeal, or enact statutes, in whole or in part, even if Congress purports to grant the President such power. *See id.* at 438-45. Such changes to the INA can be accomplished "in only one way; bicameral passage followed by presentment to the President." *Chadha*, 462 U.S. at 954-55. This may "often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 959.

In 1965, Congress rejected the arguments underlying the Executive Order—namely, that we should put America "first" by refusing to admit "greater numbers of persons of different cultures and with different values who may come to add to our own very real and growing social upheavals," or engage in "subversion." S. Rep. No. 89-748, at 3347-48 (1965). Such fearful prejudice is "un-American in the highest sense," and unworthy of Captain Khan's sacrifice. *See* Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1037, 1038 (Oct. 3, 1965). The United States has "flourished because it was fed from so many sources, because it was nourished by so many cultures and traditions and peoples." *Id.* at 1039. President Trump cannot overturn half a century of congressional policy—much less the Constitution itself—with the mere stroke of his pen.

B. The Executive Order violates the First Amendment's Religion Clauses.

The First Amendment prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Establishment and Free Exercise Clauses are "inextricably connected." *Larson v. Valente*, 456 U.S. 228, 245 (1982). They must be "read together" in light of their joint purpose "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *accord Larson*, 456 U.S. at 246.

Determining whether the Religion Clauses have been violated "requires an equal protection mode of

analysis." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970)). Lawmakers "are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. When they fail to do so, the Court must "apply strict scrutiny." *Id.* at 246. The challenged law must advance "interests of the highest order," and be narrowly tailored to those interests; it "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546 (citation omitted).

The protection of the Religion Clauses, moreover, "extends beyond facial discrimination" to forbid "subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534 (citations and internal quotation marks omitted). Accordingly, courts look to "both direct and circumstantial evidence," including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. "Indeed, the purpose apparent from government action can have an impact more significant than the result expressly decreed," so the question is not what is expressly decreed, but what an "objective observer" would perceive. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-62 (2005) (quoting *Santa Fe*, 530 U.S. at 308).

Here, the evidence of discriminatory intent is overwhelming. That evidence is discussed in the decisions below and in respondents' briefs, and need not be addressed further here. Instead, Mr. Khan asks this Court to consider the message of the Executive Order from the perspective of those on the receiving end of it. Petitioners ignore that perspective, contending that only "official statements" matter. Pet. Br. 76. But this Court rejected that argument in *Santa Fe*, holding that school prayers violated the Establishment Clause—even though they were offered by students, rather than school officials—because a student "will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Santa Fe*, 530 U.S. at 308. "Most striking" to this Court was the "evolution" of the school's policy from "the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. Although the school later removed the word "prayer" from the regulation, the "history indicates that the District intended to preserve the practice of prayer before football games." *Id.*

As in *Santa Fe*, the "evolution" from what candidate Trump candidly called a "Muslim Ban," to what President Trump *still* candidly calls a "watered-down version," shows that, although the form of the executive order has changed, the underlying message has not. The message is that Muslims are unwelcome outsiders, regardless of the depth of their devotion to the Constitution, and despite paying the ultimate price to defend it. That message is painfully clear to Mr. Khan, and also would be clear to an objective observer, who is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

Contrary to petitioners' assertions, no psychoanalysis is necessary to perceive the Executive Order's discriminatory message. As Justice Stephen J. Field stated—riding circuit before anyone had even heard of psychoanalysis—"we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879). Likewise, this Court's "precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315). Any objective observer familiar with the Executive Order's origins in President Trump's proposed Muslim Ban would perceive all too clearly the message that Muslims "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Thus, the Executive Order violates the Religion Clauses of the First Amendment.

CONCLUSION

Accordingly, Mr. Khan respectfully urges this Court to affirm the decisions below and strike down the unconstitutional Executive Order.

Respectfully submitted,

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